

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 40260/2021

REPORTABLE:
OF INTEREST TO OTHER JUDGES:
REVISED.

In the matter between:

S[....] B[....]

Applicant

And

T[....] M[....] B[....]

Respondent

JUDGMENT

MAKUME J.

[1] On the 1st September 2021 in the urgent court I granted the following relief in favour of the Applicant:

1.1 Interdicting the Respondent from unilaterally withholding contact by Applicant to the minor child R[....].

1.2 Reinforcing the interim court order handed down by Honourable De Villiers AJ on the 29th September 2020 under case number 26730/2020 in terms of which:

a) The minor child's residence would alternate between the Applicant and the Respondent on a weekly basis from Friday to Friday with a 3 night/1night split.

b) The minor child to spend Monday with the non-resident parent that week.

c) The non-resident parent to exercise daily telephone (video) contact with the minor child.

1.3 Instructing the Respondent to permit the Applicant to collect certain household items of furniture as per annexure J attached to the Applicant's Founding Affidavit.

1.4 The minor child to be returned to the Applicant on the date of hearing of this matter until Wednesday 18th September 2021 where after the contact as provided in paragraph 1.3 above shall resume.

1.5 The Family Advocate to urgently appoint a social worker to conduct a voice of the child assessment.

1.6 Costs on an attorney and client scale.

[2] The Respondent now seeks reasons for that order. They follow hereunder.

[3] The Applicant and the Respondent married each other in community of property on the 12th December 2015. The minor child who is the subject of this application was born on the 3rd September 2018. She is now 3 years old.

[4] The Applicant left the matrimonial home situate at [...] Waboon Street, Randpark Ridge, Randburg during September 2020 taking the minor child with her. Shortly thereafter on the 21st September 2020 the Respondent issued summons for

a divorce in the Randburg Regional Court citing that the marriage relationship has broken down irretrievably.

[5] On the 29th September 2020 the court order referred to in paragraph 1 above was granted and the parties have since then complied with the terms thereof as supplemented by the Family Advocate's report filed during February 2021. That order is an interim order and remains as such until confirmed, set aside or amended.

[6] On the 13th August 2021 the Respondent fetched the minor child and was to return her to the Applicant on Monday the 16th August 2021. Instead of returning the child the Respondent's attorneys addressed a letter to Applicant's attorneys which reads as follows:

"Our client has instructed us that R[....] has stated to him that your client "smacked her" when she cried and asked to go to her Dad. Our client is requesting the South African Police Services (SAPS) to investigate conduct by your client amounting to criminal offences *inter alia* assault.

Until such time as the SAPS have completed their investigation your client's contact with R[....] will be limited to video and contact supervised by our client's father or another suitable adult approved by our client. Your client may exercise daily video contact with R[....], as well as supervised contact twice a week for four hours at a time."

[7] On the 16th August 2021 Applicant's attorneys responded as follows:

"Our client will not accept your client's unilateral imposition of restrictions on her right to contact with R[....]."

[8] Applicant made it clear to the Respondent that if there is no positive response by the 17th August 2021 they intend launching an urgent application in the High Court.

[9] Despite being threatened with an urgent application the Respondent remained adamant that he will not allow the Applicant access and contact with the minor child

and cited amongst others that the minor had contact with her grandfather who had tested positive for covid. They also added in their subsequent letter dated the 17th August 2021 that the Respondent was acting in the best interest of the minor child and in order to safeguard her against possible further assault Applicant will have to await the SAPS to conclude their investigations.

[10] On the 18th August 2021 the Applicant once again informed the Respondent that she intends applying to the High Court to seek relief and give effect to the existing contact arrangements.

[11] Needless to say all that fell on deaf ears. The Respondent persisted in justifying his contempt of a valid court order on the basis that the Police first had to conclude their investigations.

[12] On the 18th August 2021 the Applicant's attorneys addressed another letter to the Respondent's attorneys informing them that she intends moving from the furnished one-bedroom apartment to a bigger apartment which is suitable for her and the minor child and for that purpose, she requested the Respondent to allow her to collect certain furniture and household items which she will require, which furniture was either in the matrimonial home and some at a storage unit. She intends to move to such premises on the 1st September 2021.

[13] The Respondent wasted no time in refusing the Applicant to get the furniture. He responded as follows in a letter dated the 20th August 2021

“The relevant items shall be dealt with in terms of the applicable matrimonial property law and accordingly, distribution thereof shall only take place upon finalisation of her divorce.”

[14] In an attempt to speed up the issue of the alleged assault the Applicant made contact with the Investigating Officer one Sergeant Nyambu who kept on sending her messages that she must wait and not be rushed up. Despite several whatsapp and telephone messages Sgt Nyambu did not make contact with the Applicant.

[15] On Friday the 20th August 2021 the Applicant was accompanied by the Police to the Respondent and the Respondent still refused to hand over the child to the Applicant. It was thereafter that this application was launched dully served answered and replied to.

[16] On Tuesday the 24th August 2021 the Applicant presented herself to the Family Violence Child Protection and Sexual Offences Unit offices in Roodepoort and provided a statement to the investigating officer.

[17] In answering to the Applicant's averments the Respondent goes all over the show firstly that the matter was not urgent and falls to be struck off the roll. He says that the issue in connection with the furniture is not urgent because the Applicant has been doing without that furniture for a year now. Secondly that in any case that furniture is to await the finalisation of the divorce so that an equitable division should take place. I fail to understand that thinking firstly because he himself is enjoying the benefit of all the movables and does not say anything about having to wait for finalisation of the divorce. He is in my view being selfish. The Applicant is moving to new premises on the 1st September 2021 those premises have no furniture like the previous one bedroom flat she occupied. She accordingly needs the furniture as a matter of urgency. In any case the issue of the furniture is not the main and real issue it is but an accessory to the fact.

[18] This matter is urgent and has always remained as such because the Respondent is in contempt of a court order.

[19] The Respondent in his answering affidavit is trying to justify his contempt of the court order on two basis firstly that the Applicant "smacked" R[....], secondly that the Applicant is a drug addict and uses marijuana.

[20] The Respondent instead of confronting the Applicant about the "smacking" to give her details of the incident decided on his own to find the Applicant guilty and deprive her of a court sanctioned rights to contact.

[21] The issue about Applicant's use of marijuana was dealt with in the previous application and despite that the court still granted the Applicant shared residency and contact rights. This was to demonstrate that the court did not view that as a bar to contact. Interestingly enough the Family Advocate in her report says nothing about the use of marijuana by the Applicant being a concern vis-a-vis the physical safety of the minor child.

[22] This matter is about the best interests of the minor child not the best interest of the Applicant and the Respondent. A court has already found that such interest will be best served in the interim by regulating contact and access in its order of the 29th September 2020.

[23] The Respondent has gone out of his way to defy that order on unsubstantiated grounds. He chose to believe without proof what the minor child said. There is no evidence of physical injury to the child. The Respondent does not play open cards he does not tell the Applicant when that "smacking" report was made to him and why he did not find it necessary to speak first to the Applicant instead of rushing to his lawyer and to the police.

[24] There is no evidence that the minor child is in danger if it is returned to the Applicant under the current court order. It is in fact dangerous at this stage for the minor child to be with the Respondent as his father has tested covid positive.

[26] In the result I find in favour of the Applicant and I make the following order:

ORDER:

1. Condoning the Applicant's non-compliance with the normal rules of service and time periods and dispensing with requirements of Rule 6(12), enrolling this application as an urgent application, and dispensing with any other forms, notices and service as may be necessary;
2. Interdicting the Respondent from unilaterally withholding contact by the Applicant to R[....];

3. Enforcing the existing contact arrangements recommended by the Family Advocate on 17 February 2021 in terms of the interim court order handed down by Honourable AJ de Villiers on 29 September 2020 under case number 26730/2020, pending the final court order in the aforesaid application and/or the finalisation of the divorce proceedings, being that;

3.1 the minor child's residence alternate between the Applicant and the Respondent on a weekly basis from Friday to Friday with a 3 night/ 1night split,

3.2 the minor child to spend Mondays with the non-resident parent that week;

3.3 the non-resident parent exercise daily telephonic (video) contact with the minor child.

4. Instructing the Respondent to permit the Applicant to collect certain household items and furniture as per annexure "J" attached to the Applicant's Founding Affidavit;

5. The minor child be returned to the Applicant on the date of the hearing of this matter until Wednesday, 18 September 2021, where after the contact as provided for in paragraph 3.1 to 3.3 above;

6. Instructing the Family Advocate to urgently appoint a social worker to conduct a Voice of the Child assessment;

7. Cost of suit on an attorney and own client scale.

Dated at Johannesburg on this 15 day of November 2021.

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances:

DATE OF HEARING : 31 AUGUST 2021

DATE OF JUDGMENT : 15 NOVEMBER 2021

FOR APPLICANT : ADV L.L. NORMAN

INSTRUCTED BY : KARLA STRYDOM ATTORNEYS

FOR RESPONDENT : ADV N. RILEY

INSTRUCTED BY : BEMBRIDGE MINNAAR ATTORNEYS